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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 733.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, a corporation,

Petitioner,

versus

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, CITY OF BATON ROUGE, LOUISIANA,

Respondents.

PETITIONER'S BRIEF.

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PETITIONER'S BRIEF.

The Opinions Below.

The Opinion and Order of the Circuit Court of Appeals here on review is reported in 156 F. 2d. 949. The Opinion and Order of the Federal Power Commission affirmed by said Court is reported in 3 F. P. C. 416, 48 P. U. R. (N. S.) 267.

Jurisdiction.

Pursuant to Section 19(b) of the Natural Gas Act (52 Stat. 821, 15 U. S. C. Sec. 717r(b)) and Sections 239 and 240 of the Judicial Code as amended (28 U. S. C. Secs. 346

and 347), petitioner filed a timely petition for certiorari to review a final order of the Circuit Court of Appeals for the Fifth Circuit which was denied on January 6, 1947. Petition for rehearing thereon was filed pursuant to Rule 33 and on February 10, 1947, your Honorable Court vacated the Order of January 6, 1947, and granted certiorari limited to the first three questions of the original petition.

Statement.

1. *Nature of the Proceeding.*

This proceeding is to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit denying petitioner's petition for review of a rate order of the Federal Power Commission (herein called the "Commission"). By the denial of the petition there was an affirmance of the Commission's order that sales of natural gas made by petitioner from its producing and gathering system in the Monroe Gas Field in Louisiana were subject to the Commission's jurisdiction and rate order under the Natural Gas Act (herein referred to as the Act) (52 Stat. 821, 15 U. S. C. Sec. 717, *et seq.*).

2. *Petitioner's Operations.*

Petitioner makes some sales of natural gas from a trunk pipe line system which extends from the Monroe Field in Louisiana southward through Mississippi and back into Louisiana, which sales of natural gas are made to local distributing companies for resale. That part of the Commission's order relating to these trunk line sales outside of the field to distributing companies is not a subject of this proceeding. Aside from the foregoing sales, however, peti-

tioner makes sales which it contends, and contended before the Circuit Court and the Commission, on petition for rehearing, are not subject to price regulation by the Federal Power Commission. The remainder of this brief will be confined to those sales which petitioner claims are unregulable by the Commission.

The Commission in this case used 1941 as the "test year" on which to determine those operative facts of its rate order (R. I, 64, 67, 68, 70, 72, 75, 77-78, 85). In that year petitioner owned and controlled entirely within the Louisiana Monroe Field 56,556 acres of natural gas lands and rights (R. II, 561) and 110 natural gas producing wells (R. II, 561, 609) and an extensive gathering system of pipe lines connected to said wells and the wells and gathering lines of other producers (R. II, 526-528, 563, 564, 569, *et seq.*, 607-610). Petitioner purchased gas from these other producers, and all gas so purchased and that produced by petitioner comes from gas wells in the Monroe Field. The gas so produced and purchased is commingled (R. II, 576, 577) and delivered to three pipe line companies (each a natural-gas company under the Act) to furnish a part of their supply from the field: The Mississippi River Fuel Corporation gets 22% of its requirements; Southern Natural Gas Company gets 16.6125% of its requirements; and Memphis Natural Gas Company gets 24% of its requirements (R. II, 794).[1] These companies then compress this gas, commingled with that obtained by them from other producers within the same field and other fields, and transport it *for the first time* out of the field and out of state (R. II, 577-581). All

[1] These percentages of supply are furnished conjointly by petitioner and Hope Producing Company, the latter not being here involved.

of the foregoing operations of petitioner take place *entirely within* the Monroe Gas Field which is entirely within the State of Louisiana.[2] All three purchasing companies receive their gas from petitioner in substantially the same manner: the gas is delivered at natural field pressures by petitioner at the purchaser's meters. (See photographs R. II, 584, 585, 590, 594, 597.) At this point all control by petitioner ceases and thereafter the purchasing companies do whatever is needed to prepare the gas for its transportation to markets in other states. The gas flows into headers (a common or manifold pipe) and is commingled with gas procured from other sellers. This commingled gas is then passed through a series of scrubbers to remove dirt and the other solids in the gas and then goes into the suction or intake side of the compressor station. In order to put the gas into shape for transportation out of the state, it is necessary to increase the pressure at which it is received from petitioner. This is done at the purchasers' compressor stations. (See photographs R. II, 582-598.) There the gas is passed through one and often two stages of compression. This pumping by the purchasers' boosts the pressure from the 100 to 150 pounds at which petitioner delivers to 425 to 450 pounds. The gas is moved out of Louisiana by the purchasing companies: Mississippi River Fuel Corporation transporting it to Arkansas, Missouri and Illinois; Southern Natural Gas Company to Mississippi, Alabama and Georgia; Memphis Natural Gas Company to Arkansas and Tennessee, where it is sold to distributing companies for resale, and to industrial consumers for use as fuel (R. I,

[2] The Monroe Field is roughly oval in shape and extends 30 miles north and south and about 20 miles east and west, enclosing an area of about 234,500 acres. Petitioner's acreage (56,556 acres) is 24% of the field (R. II, 561, 659).

150-154, R. II, 576-580, 619-620). Thus petitioner sells the gas within the field, surrenders all control at the delivery points in the field, and the gas is then cleaned, compressed and readied for transportation and delivery by the three purchasing pipe line companies. The detail of the flow of the gas from the wells to the points of sale is described in footnote 8, page 45, *infra*.

3. *The Commission's Order.*

The Commission in its rate order reduced the rates to the three pipe line companies, previously established by negotiated contract (R. II, 555-558, 792-807), from an average of 7.39 cents to 4.66 cents per M.c.f. (R. II, 827), a total per annum reduction of $596,320 based on 1941.

The Commission felt that because petitioner was a natural-gas company due to the regulable character of the sales to the Baton Rouge area and because the gas flowed continually from the wells to the ultimate points of sale to the distribution companies, the sales were "in interstate commerce" and were not excluded as being part of the "production or gathering" of gas. The Commission held that under proper legal interpretation, the clause in Section 1(b) of the Act excluding from jurisdiction "production or gathering" of gas relates only to certain of the physical activities of producing and gathering and does not include within its scope a sale made in the course of the operation of such production or gathering system (R. I, 60-62).

The Commission found in its order that petitioner did engage in production, that it did engage in gathering and that the produced and purchased gas was then "transported" in interstate commerce to the points of sale to

the three purchasing pipe line companies. (See Commission findings 7-11, R. I, 82-83). This finding is not one merely of fact, but a legal conclusion that the movement of gas prior to the three sales in question constituted jurisdictional transportation in interstate commerce.

Nowhere does the Commission point out where its jurisdiction attaches. It does not say that it is at the point of sale at petitioner's meters, at any particular point on the field system, whether on the final branches of that system, or in any preceding point nearer the wells, or at the well itself. The Commission merely finds that at some point between the actual point of production and the point of sale, the movement is changed from that of gathering to jurisdictional transportation in interstate commerce. Having so found, it decided that the sales so made were sales in interstate commerce and therefore subject to rate regulation.

4. *Proceedings Below.*

Petitioner seasonably applied for a rehearing of the Commission's order (R. I, 93-100) which is a prerequisite to further review proceedings (52 Stat. 821, Sec. 19, 15 U. S. C. 717r(b)) assigning as reasons therefor that the Commission lacked jurisdiction under Sections 1(b), 2(7) and 5(a)[3]

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[3] Sections 1(b), 2(7) and 5(a) insofar as here material are as follows:

"Section 1.

* * * * * * * * *

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of

of the act (52 Stat. 821, 15 U. S. C. Secs. 717(b), 717a(7), 717d(a)). The petition was denied and petitioner duly asked the Circuit Court of Appeals to review the order and reverse.

The Circuit Court dismissed the petition for review (156 F. 2d 949). Judge Waller, dissenting, stated that the Commission did not have jurisdiction because (a) the sales in question were part of the production and gathering of gas under Section 1(b) of the Natural Gas Act, and (b) were not sales in interstate commerce which is a further determinant of the Commission's jurisdiction under Section 1(b) and as defined in Section 2(7).

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natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

"Section 2. When used in this act, unless the context otherwise requires—

* * * * * * *

"(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

"Section 5.

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State Commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order * * *."

Specification of Errors.

The Circuit Court of Appeals erred in upholding the order of the Commission in each of the following:

(1) The Circuit Court of Appeals erred in holding that the Commission has jurisdiction under the rate-fixing section of the Natural Gas Act (52 Stat. 821 Sec. 5(a), 15 U. S. C. Sec. 717d(a)) to regulate the sales price of natural gas produced or purchased by petitioner, gathered from wells and delivered in the producing field without further control to purchasing pipe line companies which commingle this gas with gas purchased from others in the field, clean and put the gas through two stages of compression and only thereafter start the transportation of the gas out of the field and out of the state for sale for resale elsewhere.

(2) The Circuit Court of Appeals erred in failing to hold that said sales were intended to be exempt from the Natural Gas Act when Congress put into the jurisdictional provision the following:

> "* * * but [the Act] shall not apply to any other transportation or sale of natural gas or * * * to the production or gathering of natural gas." (52 Stat. 821, Sec. 1(b), 15 U. S. C. Sec. 717(b)).

(3) The Circuit Court of Appeals erred in failing to hold that the Commission had no jurisdiction over the sales here in question because said sales were not sales in interstate commerce as required by the Natural Gas Act (52 Stat. 821, Sec. 1(b), 15 U. S. C. Sec. 717(b)) as such interstate commerce is defined in the Act (52 Stat. 821, Sec. 2(7), 15 U. S. C. Sec. 717a(7)).

Summary of Argument.

I.

This is a case involving only jurisdictional questions and, therefore, one requiring strict adherence to the grant of power made by Congress. The Commission, however, made a legal conclusion of jurisdiction, without legal or factual support, which logically extends its price-fixing authority to wherever it wishes to go, and nullifies the express restrictions imposed by Congress.

II.

The Act itself is clear in exempting the sales here involved as "production or gathering of natural gas". Since production or gathering cannot take place without a sale following, the exemption must of necessity include the sale. The physical characteristics of natural gas require that some disposition be made of it immediately following its production and gathering since it does not lend itself to storage in transit, as is possible with oil and coal or other products not gaseous. The exemption terms being words of art have the meaning ascribed in the art and, as thus construed, the Commission's conclusion of jurisdiction violates the Act. This is the important matter of definition and understanding of the meaning of "production or gathering". All witnesses in the case, including the Commission's, recognized the meaning of the term "production or gathering" and presented the factual basis accordingly.

The legislative history shows an unswerving purpose to adhere to the usual and technical meaning of the words. The progress of the successive drafts of the Bill finally enacted and the enlargement of the exemption provision itself un-

equivocally show the intention of those in Congress. Furthermore, the language adopted was appropriate to this intention.

The inescapable conclusion from the Act, the legislative history, and the evidence, is that jurisdictional transmission does not begin until the gas starts its interstate journey through the interstate pipe line company's trunk system. The whole factual scheme of petitioner's Monroe Field system negates the propriety of the Commission's refusal to find these disputed sales were part of production and gathering.

III.

The cases under the commerce clause of the Constitution dealing with Acts relating only "to sales in interstate commerce" have uniformly held that such commerce is not involved at the point where one surrenders title and control within the production state—the case here. In addition, where the policy of supplementing and not supplanting state law is involved, as in the Natural Gas Act, this Court has refused to extend Federal jurisdiction where the states may control the activity. States may and do control the activities here in dispute.

The facts of this case show compression of gas destined for interstate shipment by purchasers—an activity which states may tax—which in effect packages and prepares the product for interstate shipment.

IV.

The Commission's legal conclusion of jurisdiction in spite of the limitations of "production or gathering" and "sales in interstate commerce" is based upon tenuous reasoning and misapprehension of the facts. That petitioner operates an integrated system which has some admittedly

regulable business is no more a proper foundation for over-all jurisdiction than is the fact that an integrated trunk line system makes unregulable sales.

The Commission, if it be logical, could by its rationale carry its jurisdiction to the well of an independent producer or to any absurd extreme. Nowhere does it point out where its jurisdiction begins.

ARGUMENT.

I.

Preliminary Statement.

Petitioner conceives of this proceeding as one relating only to the question of jurisdiction. Especially is this so since this Honorable Court eliminated the sole non-jurisdictional issue—*i. e.*, question number 4 which related to confiscation. Thus we have for determination that which is not subject to broad administrative power, discretion, and judgment; but instead that which is governed by inexorable standards of the boundaries of power to act in the first instance.

In its opinion, the Commission made a legal conclusion of jurisdiction without pointing out the line of demarcation. It felt, apparently, that since petitioner commingled gas which it produced with that secured from other producers, the production and gathering function both ceased and from then on there was transportation in interstate commerce subject to price regulation by the Commission (R. I. 60). These first sales within the Monroe Field are still in the gathering process as will appear in the discussion of the gathering function under part II of this brief. Also they are not price regulable sales since they are not yet

"sales in interstate commerce" as set forth in the Act (cf. *Milk Control Board* v. *Eisenberg Company*, 306 U. S. 346, 352-353). That petitioner is a "natural-gas company" under the Act does not subject all of its sales wherever and however made to price regulation by the Commission. This Court has recognized that the Commission must by some method judicially deemed reasonable limit itself only to that over which it has price-fixing jurisdiction, *e. g.* in allocating costs as between direct sales and those made to distributing companies for resale (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 588). The same is true of that part of its business which petitioner has conceded is price regulable by the Commission. The limitations of the Act have meaning and force (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 602-603) and the Commission cannot avoid these limitations by bald conclusions of law based on the desire to arrogate unto itself powers not provided nor intended by Congress.

II.

The Sales here in question are exempt from Federal Power Commission regulation as "production or gathering of natural gas."

The Court below and Commission Counsel have obviously taken *Canadian River Gas Company* v. *Federal Power Commission* (324 U. S. 581) as an Open Sesame to Commission jurisdiction over the production and gathering functions of every "natural-gas company" regardless of the inhibiting features of Section 1(b) (15 U. S. C. Sec. 717(a)) of the Act. In that case, this Court, after holding that the inclusion of production and gathering properties in the rate base did not violate the Act, stated:

> "That does not mean that the part of Section 1(b) which provides that the Act shall not apply 'to the production or gathering of natural gas' is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. *It may put other limitations on the Commission.* We only decide that it does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction" (Emphasis supplied). (324 U. S. 581 at 602-603).

Certainly the Court by adopting the italicized language felt that the exemption provision was not without effect. In the case at bar, the Commission has directly affected the field sales set forth above by prescribing the only applicable rate—an immediate impact upon the functions of production and gathering.[4]

The Court below did not distinguish the *Canadian* case from the case at bar *nor did it hold that the sales in question were not the last of a series of acts all involving the production and gathering of gas.* Mr. Justice Waller (dissenting), however, discerned the distinction between this and the *Canadian* case when he stated:

> "Natural gas must be transported to market to the same extent as any other commercial production.

[4] "It is true that the Act excludes 'production or gathering of natural gas' from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in finding it to have exceeded its jurisdiction. But the orders in question have no immediate 'impact' upon production or gathering of gas." (Concurring opinion of Mr. Justice Jackson in *Canadian River Gas Co.* v. *Federal Power Commission*, 324 U. S. 581 at 609)

> The gathering and transporting of gas to a place of sale is as essential to the production of gas as is the drilling of a gas well. Regulation of the production is forbidden, but if the Commission is given the power to regulate the price which the producer and gatherer receives at the end of the intrastate journey at the pipe line of the interstate purchaser, it is also given the power to regulate production. If the price which the producer and gatherer gets for the gas which he has produced and gathered is less than it costs to produce it, production will be thereby regulated indirectly, but, withal, as effectively as if Congress had expressly conferred such authority upon the Commission" (156 F. 2d. at 956).

The recognition by Mr. Justice Waller that the sale is an essential part of the production and gathering of gas, is based upon the physical characteristics peculiar to natural gas. It must be confined within pipe lines, it cannot be produced and stored in the production fields for subsequent shipment and sale, but as soon as produced must be taken from the well through gathering systems from which some sale or other disposition must be made. Whenever a sale or other disposition of gas is prevented, then the production and gathering must cease.

1. *What the "Production or Gathering" Exemption Means.*

Except for the narrow holding in the *Canadian River* case, we do not have the conclusion of this Honorable Court on the meaning of the "production or gathering" exemption of the Act. This Court, as shown in the quotation from the *Canadian* case, reserved judgment on the full meaning of the term.

Like the Federal Power Act (49 Stat. 838, 16 U. S. C. 79a; see *Connecticut L. & P. Co.* v. *Federal Power Commission*, 324 U. S. 515, 529-530) the Natural Gas Act is couched

largely in the technical language of the art. Such being the case, the words "production or gathering" should be construed in the light of the understanding of those in the particular trade, business or transaction (See *O'Hara* v. *Luckenback S. S. Co.*, 269 U. S. 364, 371).

a. Understanding in the Art.

In the understanding of the petroleum art, "production or gathering" compasses those functions of petitioner which it here claims are unregulable by the Commission. This is evident from many sources.

In 1916 the Federal Trade Commission, pursuant to Senate Resolution No. 109, 63d Congress, 1st Session, submitted a report entitled "Report on Pipe Line Transportation of Petroleum" relating to the rates *et cetera* of oil pipe line systems. At page 70 thereof the Commission stated that two distinct services were rendered, a gathering service and a transportation service. In describing the gathering service, the type of operation carried on by petitioner was very clearly described:

> "GATHERING LINES.—The gathering lines comprise those lines which receive the crude oil from the producers' tanks and deliver it into the receiving tanks at a pumping station of the gathering or trunk line or deliver it directly into the main pipe line. The primary function performed by the gathering lines is that of collecting the oil from the wells and delivering it to a receiving station from which it can be transported to its destination."
>
> . . . . . .
>
> "TRUNK LINES.—The trunk or main line comprises those lines which receive the oil from the gathering lines and relay it from station to station until it reaches its final destination or is transferred to some other carrier. Its sole function is that of

transporting oil, and it includes the main lines and also the lateral lines leading from the receiving stations to the main artery of the trunk line."

In the Final Report of The Federal Trade Commission, referred to in Section 1 of the Act (Senate Document 92, Part 84-A) as a basis for its enactment, there is this classification:

"Production companies, as classified, are those companies which own gas leases, wells, and pipe lines which connect the wells with the transmission system * * *. (Ibid 286)

* * * * * *

"Producing and transmitting companies are those which own transmission pipe lines in addition to wells, leases, and gathering lines. This class of companies also owns and operates compressor stations which are utilized to boost the pressure within the transmission line and to pump natural gas from wells in which the normal, or rock, pressure is not sufficient to meet operating requirements. (Ibid 286)

* * * * * *

"* * * Transmitting companies are those which own and operate the main transmission pipe lines from the point of receipt of gas from field-gathering lines to the points of delivery of gas to distributing companies at town border measuring stations, to industrial plants, and to other customers." (Ibid 286)

A distinction apropos here has been made in cases under the Revenue Acts.

In *Alexander* v. *Cosden Pipe Line Company*, 290 U. S. 484, 491, 78 L. ed. 452, the United States Supreme Court considered the scope of the "gathering" operation in connection with the tax imposed by the Federal Revenue Acts of 1917 and 1918 upon "the transportation of oil by pipe

line"—the tax being applicable to both common and private carriers. The Tax Commission assessed a tax against Cosden and Company upon the theory that its delivery of oil to a particular point constituted *both* a gathering and a trunk line transportation service. The lower courts held that the assessment was erroneous because the delivery involved only a gathering service. And the Supreme Court affirmed this portion of the lower court's decision, saying (290 U. S. 491):

> "The plaintiff, an Oklahoma corporation, owns pipe lines leading into Tulsa, Oklahoma, from oil fields in that State and operates its lines in the transportation, intrastate, of crude oil. All of its stock is owned by Cosden and Company, another Oklahoma corporation, which operates an oil refinery at Tulsa. * * *
>
> "The plaintiff is engaged chiefly in carrying oil for Cosden and Company, but it also carries large quantities for others. It does not hold itself out as a common carrier, is not required by the State to file or publish rates or tariffs, and does not file or promulgate either. Common carrier pipe lines operating in the vicinity of the plaintiff's lines have both trunk lines and gathering lines—and also tariff stations at which oil is received into the trunk lines. The plaintiff has no tariff stations and receives oil at any place along its lines where it can obtain the oil. Its lines are gathering lines only and comparable only to the gathering lines of the common carriers; and the service which it renders, as compared with that rendered by the common carriers, is a gathering service only. While not appearing in the findings, the stipulated facts included the following:
>
> 'Any pipe line reaching from any point where oil is purchased or produced to the trunk or main line or to storage tanks at or near the main or trunk line or to tank farms is called a gathering

line, without regard to its size, the distance, or the amount of oil carried through such line to the trunk or main pipe line, or to the trunk or main pipe line storage tanks, or to a tank farm.' "

An important case in point following the *Cosden* decision is *Caminol Co., Ltd.* v. *United States* (41 Fed. Supp. 819, 823). This involved Section 731 of the Federal Revenue Act of 1932 which applies a tax on the transportation of crude petroleum by pipe line. In accordance with the statute, the Tax Commissioner, after hearings, or conferences, fixed two tax rates—one applicable to the "gathering" of petroleum, and the second applicable to "transporting". The Commissioner assessed the Caminol Company at the "transporting" tax rate, and Caminol (together with other plaintiffs) sued to recover a portion of the tax on the ground that it should have been assessed at the lower "gathering" tax rate. The Court found for the plaintiff and rendered judgment of recovery. In determining that the Caminol Company was engaged in a "gathering" operation, the Court relies upon the *Cosden* case, and, after quoting extensively from that decision, continues (41 Fed. Supp. 823):

"The carriage of oil herein considered is essentially similar to that held 'gathering' in the Cosden case. * * * Caminol's oil was conveyed from the settling tanks at the wells by small lateral or feeding lines to a larger pipe line and thence, for a distance of slightly more than two miles, to its refinery. There were no storage or receiving tanks or stations or pumps at the junctions of the lateral lines with the larger line, but such feeding lines were directly joined to the larger one. The oil thus conveyed was forced through said lines by said plaintiff's pumps maintained at the wells where the oil was produced and gauged. When so transported the oil either was delivered immediately

to the refinery or placed in storage tanks near the refinery where it was held until needed for refining. Such tanks were incident to the operation of the refinery. All the oil in question was transported in uninterrupted movement from the place of production to that of refinement.

"There is further similarity between the Cosden case and the instant actions. The definition of gathering in said case was substantially the same as that agreed to at the conference at Washington. In that case (Cosden) it was said:

'While not appearing in the findings, the stipulated facts included the following:

"*Any pipe line reaching from any point where oil is purchased or produced to the trunk or main line* or to storage tanks at or near the main or trunk line or to tank farms is called *a gathering line,* without regard to its size, the distance, or the amount of oil carried through such line to the trunk or main pipe line, or to the trunk or main pipe line storage tanks, or to a tank farm.

"The gathering charge is a sum paid for the service rendered in moving oil from the point where it is tendered to or received by the carrier, whether it be the working tank at the well or the storage tanks in the field, to the trunk or main line tariff stations, or to a tank farm of the carrier or to main-line storage tanks. * * *"

'As heretofore defined, the conference understanding was that *gathering is the movement of the oil from the point where gauged for royalty purposes* (generally the settling or flow tanks at the wells where the oil is produced) *to the trunk or main pipe line* (generally storage tanks situated at the main line). (Italics as in Opinion.)'"

In addition books and treatises have sustained the position of petitioner. A recent book, entitled "This Fascinat-

ing Oil Business,"[5] also illustrates the practical distinction between "gathering" and "transmission". Chapter X of this book is entitled "Transporting the Oil", and it contains (at page 175) the following apt discussion:

"THE GATHERING SYSTEM"

"The initial pipe-line task is to get the oil from the lease tanks, scattered about the field on the various leases, to a central pump station at the beginning of the main line. This is done through 'gathering lines' from two inches to eight inches in diameter, usually buried from a foot to three feet below the ground, though in warm climates, and in fields where the oil does not congeal when cold, some of them may be above ground. The oil may flow through them by gravity or be forced through them by 'field pumps' or 'gathering pumps'. In a good-sized field there are many miles of gathering lines, and the investment in them and their pumps and auxiliary tanks may run into hundreds of thousands of dollars. * * *"

"TANKAGE"

"The gathering system delivers the oil into big steel tanks at the main pump station, where it is stored until it goes into the main line. * * *"

"THE PUMP STATIONS"

"The trunk-line pump station to which the gathering system delivers the oil is equipped with powerful pumps for propelling the oil through the line. If the line is long, similar pump stations will be located at intervals along it, usually about forty miles apart in level country and closer together in crossing mountains. * * *"

* * * * * * *

[5] Author: Max W. Ball; Publisher: The Bobbs Merrill Company.

"THE TRUNK LINE"

"The trunk line is to a pipe-line system what the main line is to a railroad, with the gathering system comparable to the spurs and sidings and the pump stations to the motive power."

In 1930, Hollis P. Porter published a book entitled "Petroleum Dictionary for Office, Field and Factory" (The Gulf Publishing Company, Houston, Texas), containing the following definition of gathering lines for natural gas:

"GATHERING LINES. Pipes connecting production tanks at oil wells with trunk pipe lines. In natural and casinghead gas systems, the lines that connect with the wells and carry the gas to the main pipe lines."

In Glassmire's treatise on "Oil and Gas Leases and Royalties" (Thomas Law Book Company, Second Edition, 1938), the following statement appears under the heading "The Production of Petroleum," at page 29:

"Movement of oil in gathering lines, or from wells to storage, does not constitute transportation of oil within the federal laws, but movement by pipe line to a distant market or a refinery located in another state is transportation in interstate commerce. *Carter Oil Company* vs. *Alexander*, 50 Fed. (2d) 214; *In re Champlain Ref. Co.* (1927), 129 Okla. 166; 264 Pac. 160."

In the recent handbook, entitled "Done on Oil", by David D. Leven (Carldon Publishers, New York, 1941), the following statement is made at page 49 under the heading of "Transportation":

"A pipe line system consists of two divisions. One is a gathering system which transports the oil

> from the wells to points of delivery within the gathering districts or to lines for transportation beyond such a district. The trunk line system is used for transporting the oil which has been gathered from the wells or received from connecting lines to distant refineries or seaboard."

During the war, the emergency regulation of the natural gas industry for the purposes of allocating materials was committed to the War Production Board. But because of the association of gas and oil in the field, the W. P. B. transferred to another War agency, the Petroleum Administration for War, the regulation of natural gas "production". The War Production Board retained for regulation by itself the "public utility functions" of the natural gas business, *i. e.*, "transmission and distribution". After several preliminary orders, the War Production Board on March 14, 1942, issued Preference Rating Order No. P-98 (Federal Register, Vol. 7, p. 2099, March 17, 1942), giving to the Petroleum Administration for War control over the production of petroleum, including natural gas. In defining the scope of the jurisdiction so transferred to the Petroleum Administration for War, the War Production Board used the following principal definitions:

> "(3) *'Main Gas Trunk Line'*—means any pipeline and appurtenant structures carried as a 'trunk line' on the books of an Operator in accordance with the regulations of any duly constituted public regulatory body or, where there is no duly constituted public regulatory body regulating the accounting procedures of the Operator, carried as a 'trunk line' on the books of an Operator for Federal or Dominion (whichever is appropriate) Income Tax purposes.
>
> "(4) *'Production'*—means the discovery, development and depletion of Petroleum Pools; • • • the

operation of any facility for the processing of natural gas, including but not limited to natural gasoline extraction plants, field pressure maintenance plants, repressuring plants, cycling plants, dehydration plants, or desulphurization plants; the operation of any natural gas connecting lines from a wellhead connection or from a Main Gas Trunk Line to or from such plants; and *the operation of any stationary gathering systems or surface connections for the conveyance of natural gas to the point of connection with a Main Gas Trunk Line.*" (Italics supplied.)

Even the Commission's own staff experts classified the physical properties through which the gas is delivered in the Monroe Field as production plant under the Commission's prescribed accounting methods.

In preparation for the hearings in these rate proceedings, several members of the Commission's staff spent months in Monroe, Louisiana, inspecting petitioner's property and preparing reclassification and other studies thereof.

One such staff member was the witness Magruder. This witness is one of the Commission's Principal Examiner of Accounts, with an impressive experience in accounting matters with a number of oil companies and with the Gas Utilities Division—Railroad Commission of Texas, prior to his work with the Federal Power Commission. On the basis of his work in Monroe, he prepared a reclassification of petitioner's property in accordance with the Commission's Uniform System of Accounts (herein referred to as the "Code") (R. I. 333, 334, 335; R. II. 687). He followed the instructions of the Code, including No. 16 which is a definition of the property to be classified in the accounts as "Transmission System". This reads:

"A. 'Transmission system' means the land, structures, mains, valves, meters, boosters, regulators,

tanks, compressors, and their driving units and appurtenances and other equipment used primarily for transmitting gas to a particular municipality or distribution system. The transmission system begins at the outlet side of the valve at the connection between *the gathering lines* or other source of supply and inlet to the transmission compressor station or other *gathering terminals,* and includes the equipment at such connection that is used to bring the gas to transmission pressure, and ends at the inlet side of the equipment which meters or regulates the entry of gas into the distribution system. It does not include storage land or structures." (Italics supplied) (Page 51 Uniform System of Accounts.)

Mr. Magruder included under the designated account for Transmission Mains, No. 353, the lines T-1 and T-9 in accordance with the appropriate instructions (R. I. 336; R. II. 685, 696).

The field lines were classified in his exhibit in accordance with the specific instructions found under "Production Plant" (R. I. 336-337). These read:

"333.1 Field Lines

"This acount shall include the cost installed of field lines used in *conveying natural gas from the wells to the point where it enters the transmission* or distribution system.

"1. Line drips and separators.

"2. *Gathering Lines,* including pipes, valves, fittings, and supports.

"333.2 Field Measuring and Regulating Station Equipment

"A. This account shall include the cost installed of meters, gauges, and other equipment used in measuring or regulating *natural gas collected in field*

lines before it is conveyed to the point where it enters the transmission or distribution system.

"B. This account shall be subdivided as follows:

"333.21 Field Compressor Station Equipment.

"333.22 Field Measuring and Regulating Station Equipment." (Italics Supplied) (Page 63 Uniform System of Accounts.)

Each field line from F-1 to the last constructed field line shown on petitioner's books was specifically classified by the witness as a part of production plant (R. I. 337) and was included under those headings in the classification exhibit (R. II. 684, 695).

Thus it is clear that the very same pipe lines through which the gas flows to the points of delivery to the three pipe line companies are classified, under rules established officially by the Commission itself in the Code, as *gathering lines*. The witness proceeded strictly in accordance with those rules and not a single foot of field lines was classified as a transmission line. Only lines T-1 to T-9 transporting gas to Baton Rouge were placed under "Transmission Plant" (conceded to be subject to Commission jurisdiction). Since the field lines are "gathering lines" under Code account 333.1, then it follows inevitably that the functional operation of those lines is the activity of "gathering".

In a later exhibit Mr. Magruder computed depreciation and depletion for petitioner's property. Here again the field lines were included under Production Plant—Account No. 333.1 (R. II. 740, 741, 746). To emphasize more strongly that these field lines are not treated in any sense as transporting gas, he computed the rate exactly as he did for producing acreage. This is on the basis of petitioner's remaining gas reserves, which ties the field lines indefinitely

to the life of the wells (R. II. 744, 746). This is entirely different from the manner of computing the depreciation rate for transmission lines. In no single instance were these field lines treated by the Commission staff as transporting instead of gathering gas.

Another member of the Commission staff who spent many months in Monroe examining petitioner's properties and operations was its engineer and geologist, Mr. Paul C. White, a practical gas engineer experienced in studying all engineering and scientific phases of the natural gas business (R. I. 283-289). This witness prepared three voluminous reports on petitioner's operations: a study of gas reserves (Exhibit 50), a study of service lives and depreciation (Exhibit 51), and a report of the petitioner's properties and operations (Exhibit 49).

Throughout Mr. White's testimony and in all his exhibits not one of the field lines used in making deliveries of gas to the three pipe line companies was listed or described under transmission plant. On the contrary, he placed them all under production plant.

In describing the operations of petitioner, he stated:

> "• • • The Interstate company owns and operates 110 gas wells in the Monroe Gas Field and *gathers this gas in the field* and *transports it from the said Monroe Gas Field,* located in northeast Louisiana through a *22-inch transmission pipe line* (looped), into the State of Mississippi and back into the State of Louisiana to Baton Rouge, Louisiana. (Italics supplied.) (R. II. 604).
>
> • • • • • • •
>
> "The Interstate company owns one *compressor* station (De Siard Station) *in the Monroe Gas Field* which compresses low pressure gas which the Inter-

state company produces and purchases in the Monroe Field *and transports from the field through pipe line* T-1. * * *" (Italics supplied.) (R. II. 606).

The same field operations take place in delivering gas to the three pipe line companies which they transport from the Monroe Field. These operations, constituting the gathering of gas for petitioner's own transmission line to Baton Rouge, likewise constitute the gathering of gas for sale to the three pipe line companies.

The map (R. II. 608) prepared by Mr. White to show the wells and field lines does not designate any field line as a part of transmission plant and shows lines T-1 and T-9 only so far as the map permits (R. I. 291). He speaks of petitioner's "integrated field pipe lines" (R. I. 609) from which gas is sold to the three pipe line companies (R. I. 610).

The map entitled "Transmission Pipe Line System" (R. II. 624) shows lines T-1 and T-9 and does not show a single field line used to deliver gas to the three pipe lines, although the outline of the Monroe Field is shown and included therein are those three pipe lines (R. I. 291). It is clear that Mr. White does not treat the gas delivered to those pipe lines as being "transported" prior to its delivery (T. I. 302, 303; R. II. 630).

In determining the methods and rates of depreciation this same witness reaffirms his classification of the field lines under production plant. He made a thorough inspection of the property and assured himself that the "units of property had been properly classified" (R. II. 676). He recommended a depletion plan for the total production plant, including field lines (Account 333.1) which means every line in the Monroe Field designated by the letter "F" (R. I. 325; 326; R. II. 678-680).

Transmission plant was placed on a straight line depreciation method and not a single field line was included under this plan (R. I. 319; R. II. 740, 741).

The cost of service, including a return on the net production plant of 6½ per cent (R. I. 396), for gas produced, purchased and delivered in the Monroe Field was determined by James V. O'Connor, Senior Rate Investigator, whose experience included work with the American Gas Association relating to natural gas companies (R. I. 369, 370). He arrived at a cost of gas delivered to the three pipe line companies and to petitioner's own De Siard Station at 4.66 cents per M.c.f. (R. I. 400; R. II. 827). He divided all operations of petitioner into "functional groupings" (R. I. 381), the first one being described thus:

> "(1) Monroe Field Operations, including the production and purchase of gas in Monroe Field, the delivery and sale of gas to three pipe line companies, and the delivery of gas to De Siard Compressor Station, the first compressor station on the Company's main pipe line to Baton Rouge." (R. II. 814.)

All the costs incurred in the Monroe Field, including the cost of operating all field lines, were assigned to this functional group, no separation being made of the cost of operating the field lines (R. I. 382).

In all computations made by the witness, "production operating expenses" were those so defined by the Code of Accounts (R. I. 382). An examination of the exhibit on costs shows that no part of the pipe lines used in delivering gas to the three pipe line companies was ever treated as transmission plant. Just as did the other witnesses, Magruder and White, Mr. O'Connor included under production plant all the field lines owned by petitioner. Without quoting therefrom, we refer the Court to the record (R. II. 816, 817, 818, 829, 831).

Probably the most recent pronouncement on the extent of the gathering function is contained in a Commission Staff report issued in March, 1947. In treating the general problem of the function of gathering, this report (F. P. C. G-580, *Practices and Problems in Producing, Gathering and Processing Natural Gas,* pp. 83-84) states:

> "The purpose of a gathering system is to collect gas from individual wells and deliver it to a central point for further disposition. In the case of gas produced with oil the gas is first separated from the oil at a trap or separator usually located at the well or at tank batteries. The individual lines from the wells will generally be connected to feeder lines or trunk lines from the various leases and merged at one point, generally at the intake of a natural gasoline plant. Regulators for controlling pressure may be installed in the gathering system. The discharge from the gasoline plant, unless the residue is vented, must be piped to a transmission line for marketing.
>
> "The point of separation of the gathering and transmission facilities often presents a difficult question as to which there is no standard or exact definition. In general practice, however, a gathering system would usually be regarded as extending to a point beyond the gasoline extraction plant and field compressor station, prior to receipt into the transmission system."

Petitioner extracts no natural gasoline because the gas out of this field is dry (R. I, 469).

Petitioner's own production superintendent considered the properties in question as gathering lines and stated they were always referred to as such (R. I, 171). He defined a gathering line as "a line that is projected into a section of the field to gather gas from numerous sources of supply" (R. I, 172) and at the same place in the record he stated:

> "Well, I would say that if you had a source of supply to be met, or a central point at which you wanted to gather the gas for delivery into a pipe line, I would say that the lines projected from this point to any place would be gathering lines, because the object of them is to gather gas and bring it to certain points" (R. I, 172).

b. Legislative History.

If the meaning of "production and gathering" still is uncertain, reference to the legislative history of the Natural Gas Act should clear the last vestige of doubt.

The Court below was content with using the following excerpt from the Senate and House Committee reports on the bill finally enacted (156 F. 2d. 949 at 952):

> "There is no intention in enacting the present legislation to disturb the states in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales in interstate commerce, (for example sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character, and, even in the absence of congressional action, not subject to state regulation. (See *Missouri* v. *Kansas Gas Co.*, (1924) 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

From this it concluded that the Commission correctly determined that the disputed sales were regulable under the Natural Gas Act. There is in the Congressional Report or the portion quoted above or in any other bit of legislative history absolutely nothing to indicate a change in the pur-

pose of Congress when it decided only to regulate those features of the natural gas business occurring in interstate transmission and sale and not to touch those matters of either exclusive state or concurrent control. The Court below decided, however, that such change of purpose did occur. It is respectfully urged that even in the portion of the Report quoted by the Circuit Court, the Committees speak:

1. Of not disturbing state-jurisdiction;
2. Of sales at wholesale—giving as examples producer sales *to distributors*—here the three purchasing pipeline companies make the distributor sales;
3. The basic intention of extending control to those sales held by this Court to be beyond the jurisdiction of the States.

Out of the Circuit Court's own quotation the intention is clear: Where the States can act, the Federal Power Commission is not intended to act. To make this intention clearer and to obviate such a dispute as this, Congress further put into *the Act*—not a bill only, not a report only, and not a debate only, but into the Act itself—an express exception to the conference of jurisdiction.

Apparently the Court below and Commission Counsel have been trying to express and adapt that which has been observed by a distinguished legal scholar:

> "Successive drafts of the same Act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such choice."[6]

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[6] Landis, A Note on Statutory Interpretation, 43 Harvard L. Rev. 886.

The Circuit Court stated that petitioner was fallacious in using the legislative history of previous drafts of the Act instead of the one finally enacted into law. The history,—including the previous drafts and reports thereon—however, instead of showing choices which indicate Congressional intent show an unswerving purpose to exempt the types of sales here in dispute.

This Court in *Connecticut L. & P. Co.* v. *Federal Power Commission* (324 U. S. 515) took occasion to criticize and reverse the Commission for unwonted arrogation of authority. The Court examined the Power Act and its legislative background to refute any specious argument of jurisdiction over the Connecticut Company and expressly dealt with using a flow argument in the face of Congressional limitation by pointing out that such a thesis can run jurisdiction to the toaster on the breakfast table which is an unthinkable thing in this republic. There this Court concerned itself with the complete legislative background and the professions of the framers of the bill who happened to be of the Commission Staff. Petitioner has done no more and if fallacy there be in so doing it is a fallacy of this Court. In addition in *Federal Power Commission* v. *Hope Natural Gas Company*, (320 U. S. 591 note 19) this Court considered the successive drafts of the bill.

(i) *The enactment of the Natural Gas Act:*

The first proposal for the regulation of sale and transportation of natural gas in interstate commerce was introduced in Congress in 1936. Subsequent bills were substituted and later new proposals were introduced before the final enactment of the Natural Gas Act in 1938. The legislative history of all of these measures is pertinent to the problem of interpretation now presented to the Court.

(2) *Bill Proposed in 1936—Lea Bill:*

Within three months following the submission of the Federal Trade Commission's Final Report, bills to regulate natural gas were introduced into both House and Senate. These were H. R. 11662 and S. 4480 (74 Congress, 2nd Session). The House bill is commonly referred to as the Lea Bill.

As introduced, the Lea Bill in large measure reflects the report of the Federal Trade Commission. It is obvious that, in H. R. 11662, the House Committee had formulated a definite policy to exclude from Federal regulation certain phases of the natural-gas business even though such phases might be regulated as a part of or as affecting interstate commerce.

The nature and extent of this exclusion is shown by the explanations given by committee members and others given in the hearings and debates. These we fully explore below.

(3) *The Controlling Explanation Given At The Hearings on H. R. 11662:*

H. R. 11662 had, in large measure, been drawn by two members of the Federal Power Commission staff, who had been loaned to the House Committee for this purpose: Mr. Dozier A. De Vane, the Solicitor of the Commission, and Mr. Thomas J. Tingley, its Assistant Solicitor.

In April of 1936, the House Committee on Interstate and Foreign Commerce held public hearings with respect to H. R. 11662, and Chairman Lea called Mr. De Vane to testify as the first witness and explain the bill. The importance of this testimony cannot be overlooked and the opening remarks show the authority with which the witness spoke.

The opening remarks were as follows (Record of Hearings on H. R. 11662, page 9):

"Mr. Lea:

"It is the intention of the committee first to hear the representatives of the Federal Power Commission and the Federal Trade Commission. Before the hearings are completed we hope to hear from interested parties as largely as is necessary to cover the subject.

"At this time we will hear Mr. De Vane, representing the Federal Power Commission.

"Mr. De Vane, you may proceed in your own way.

"Mr. De Vane:

"Mr. Chairman and members of the Committee, my name is Dozier A. De Vane. I am solicitor for the Federal Power Commission and have been in that position for approximately two and a half years. I appear here this morning at the request of the Chairman of your full Committee and of your Subcommittee, and that the record may be clear, may I also state that I do not appear in the capacity of a representative of the administration in connection with any legislation that it has submitted to the Congress.

"This committee will recall that as a part of H. R. 5423 was title III, which had for its purpose the regulation of this industry.[7]

"Title III of that bill was substantially the same in language as the part of title II that related to the regulation of the electric industry.

"Substantially the only difference was that gas was substituted for electricity in the language of the bill.

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[7] The reference is to the Public Utility Holding Company Bill introduced by Mr. Rayburn in 1935.

"After the hearings upon that bill, titles II and III—when I refer to title II, I mean that part of the bill providing for an amendment to the Federal Water Power Act bringing under Federal regulation electric utilities—both that title and title III, which provided for the regulation of the natural-gas industry was referred to the same subcommittee and considered by the same subcommittee.

"I suppose it is not out of place if I should say for the record here that title III, which related to the regulation of the gas industry was not reported out with title I and title II.

"The bill that you have now, H. R. 11662, is in substantially all respects, insofar as it goes similar to the provisions of the Federal Power Act with reference to the electric industry. The bill itself does not go quite as far as nor does not confer quite as much jurisdiction upon the Commission as does the Federal Power Act.

"I shall not, in my presentation this morning, undertake to discuss the gas industry, as this committee knows an investigation with reference to that subject has been made by the Federal Trade Commission under Senate Resolution 83, Seventieth Congress, first session, and a representative of that Commission will appear and present to the committee factual data that were developed by that investigation."

After some additional opening remarks and the presentation of a legal brief discussing the provisions of the bill, Mr. De Vane proceeded to discuss the bill orally and commenced as follows, (*ibid.*, p. 24):

"Mr. De Vane:

"Section 1(a) of the bill is a declaration of the necessity for Federal regulation. It recites the in-

vestigations that have been made, points out that this industry has now reached a point where Federal control and regulation of the industry is necessary.

"Section 2 defines the jurisdiction——

"Mr. Merritt:

"Mr. Chairman.

"Mr. De Vane (continuing):

"Section 1(b) defines the jurisdiction over the industry.

"Mr. Lea:

"Mr. Merritt wanted to ask you a question.

"Mr. Merritt:

"I thought you were going to skip that. That is what I wanted to ask about.

"Mr. De Vane:

"No, sir. Section 1(b) provides that the provisions of this act shall be applicable to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas in low-pressure mains or to the facilities used for such distribution or to the production of natural gas.

"Mr. Merritt:

"Well, facilities for such distribution refer only to low-pressure distribution, does it?

"Mr. De Vane:

"It refers to distribution of natural gas to consumers.

"The whole purpose of this bill is to bring under Federal regulation the pipe lines and to leave to the State commissions control over distributing companies and over their rates whether that gas moves in interstate commerce or not."

After some little discussion as to the scope of this first exemption, the record continued as follows (*ibid*, p. 28):

"Mr. De Vane:

"* * * Now, Section 1(b) also provides that the Commission shall have no jurisdiction over the gathering or gathering rates for natural gas.

Mr. Cooper:

"What do you mean by gathering rates:

"Mr. De Vane:

"The rates that are paid in the gathering field, Mr. Cooper."

Thereafter, Representative Cole inquired further into the meaning of Section 1(b) (*ibid*, p. 32):

"Mr. Cole:

"* * * in order to determine the cost of the property which you say is absolutely essential before you can go into the establishment of reasonable rates or charges, the Commission will go into not only the great Panhandle Field of Texas and other gas fields, but into the oil fields as well, where, of course, there is gas?

"Mr. De Vane:

"No; I am not so sure that would be correct. The jurisdiction conferred by this bill is limited to the transportation lines and transportations.

"Mr. Cole:

"Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable

to that which your Commission now has over hydro-electric generating plants?

"Mr. De Vane:

"It does not; no. It does not attempt to regulate the gathering rates or the gathering business. Section 11, I believe it is, of the bill deals with that.

"Mr. Cole:

"I do not want to disturb the continuity of your presentation, section by section.

"Mr. De Vane:

"Well, I will get to that in a few minutes. But Section 11 deals with State compacts, not in the sense of prescribing what State compacts should be but simply gives to the Commission authority to investigate and report to the Congress upon the State compacts that are submitted for approval. But the bill itself does not attempt to regulate either the gathering end or the distributing end of the business; I mean the local distribution of gas."

Subsequently in the hearing Chairman Lea again pressed for a statement as to the scope of the "production" exemption (*ibid.*, pp. 42-43):

"Mr. Lea:

"Mr. De Vane, I would like to go back just a moment. Of course it is a question of regulation. Suppose that the A company owns a gas supply and the B company transmits it into another State, distributes it to a local company for distribution. Now suppose the question arises as to whether or not the charges which the A company makes against the B company for the gas is reasonable. What, if any, authority would the Commission have on that question, under this bill?

"Mr. De Vane:

"Yes, if I understand your question, concerning the price paid to the A company, *there is no control of the gathering rate; the Commission would have no jurisdiction.* That price is fixed by competitive conditions that exist in the field. But it matters not how many different ownerships there may be between the time the gas starts to move in interstate commerce and gets to the city gates. Ownership might change a dozen times—A company sell to B, and B company sell to C—all those rates would be subject to regulation. (Italics supplied.)

"Mr. Lea:

"Well, when the supply company is broug before the Commission in an action to regulate its rates, and they say, 'We have got to pay so much for gas; we cannot control that price which they charge us, and we have to charge a higher price delivered to the Buyer.' Does the Commission have any power over that?

"Mr. De Vane:

"No; not the price that is paid to the gatherer, to the man who produces it; that is binding if the transaction is at arm's length. If the transaction is not at arm's length of course its reasonableness may be inquired into under the decisions of the Supreme Court."

(4) *The Revised Natural Gas Bill of 1936—H. R. 12680:*

Following its hearings on the bill, the House Committee on Interstate Commerce revised the bill, and it was reintroduced on May 12, 1936 as H. R. 12680 of the 74th Congress, 2d Session.

Section 1(a) of the bill remained substantially unchanged. But Section 1(b) was revised considerably, and it is of particular interest that, in the light of Mr. De Vane's testimony, the Committee broadened the exemption for the "*production* of natural gas" to the more inclusive language "*production or gathering* of natural gas." The revised section read as follows:

> "(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of such gas for resale to the public, and to natural gas companies engaged in such transportation or sale, but shall not apply to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas: Provided, that nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only."

No action was taken in the 74th Congress with respect to H. R. 12680.

(5) *The Completed Bills of 1937 and Final Passage.*

Early in 1937, Chairman Lea again introduced the bill in form identical with H. R. 12680 of the preceding Congress. This was designated H. R. 4008, 75th Congress, 1st Session.

Hearings on H. R. 4008 were held by the House Committee during March of 1937, the bill was further revised, and in April of 1937 was reintroduced as H. R. 6586.

Section 1(a) of H. R. 6586 was substantially identical with that of the previous bills. Section 1(b) was revised to read substantially as it does in the Act as passed.

The bill was debated in the House of Representatives on June 16, 1937 and was passed on July 1, 1937. It was then sent to the Senate, and was reported out of the Senate Committee on Interstate Commerce without change. Senator Wheeler brought the bill up for consideration on August 14th and 19th, but each time, after some debate, it was passed over for additional study. On June 7, 1938 the bill was again brought up by Senator Wheeler, and it was passed with certain amendments. The amendments were modified at the instance of the House of Representatives and the bill was finally passed on June 14, 1938.

(6) *Explanatory Statement Made in the Congressional Debates:*

The course of the debates shows clearly that the members of the House and Senate, in particular the Committee having charge of the bill, shared Mr. De Vane's conception that the Act excludes field sales of natural gas.

During the debate on July 1, 1937 (Congressional Record, Vol. 81, p. 8675 (Part 6, p. 6721)), Chairman Lea, as the sponsor of the bill, explained its terms to the House. In the course of this explanation, he stated:

> "There are, however, some situations defined in the bill to which this regulation does not apply. One is local distribution on the principle that where commerce passes in interstate commerce and reaches the point of broken package, the local State commission then has the regulatory power. That same general rule applies to the transportation and sale of gas. So this act does not affect the local distribution of gas. It affects the local consumer's price only by regulating the price at the city gates. The facilities for local distribution are not within the power of regulation provided in the bill.

"The bill does not apply to the production and gathering of gas."

Note particularly Chairman Lea's statement to the effect that the Act affects the local consumer's price only in one respect, *i. e.*, by regulation of city gate prices; also Chairman Lea's emphatic reiteration of the Act's exclusion of production and gathering.

Representative Halleck of Indiana, likewise a member of the House Committee on Interstate Commerce, followed Mr. Lea with additional explanations of the bill (Congressional Record, Volume 81, p. 8677 (Part 6, p. 6723)). He said in part:

"• • • Gas is brought from the producing areas in these pipe lines and sold at the city gates to the public utilities which distribute the gas to the consumers. It is obvious the distribution of the gas by the local distributing company is subject to State regulation and the interests of the consumers are protected by State regulation. However, the transportation of gas in interstate commerce in the pipe lines and its sale to the distributing companies for resale is not subject to State regulation, and as a result, we have had a situation under which the price charged the distributing company at the city gate has been fixed wholly by the judgment, discretion, or action of the interstate company. It is charged that in many cases that price is excessive. This bill seeks to regulate those prices."

In the Senate on August 19, 1937 (Congressional Record, Vol. 81 (11981), Part 8, p. 9312), the following discussion took place between Senator Wheeler, Chairman of the Senate Committee, and Senator Austin:

"Mr. Austin:

"Mr. President, may I ask the Senator from Montana (Mr. Wheeler) a question concerning this bill?

Does the bill undertake to regulate the production of natural gas, or does it undertake to regulate the producers of natural gas?

"Mr. Wheeler:

"It does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce.

* * * * * *

"Mr. Austin:

"Is the bill limited in its scope to the regulation of transportation?

"Mr. Wheeler:

"Yes; it is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale."

Additional statements of Senator Wheeler in the course of the above Senate debate (Vol. 81, p. 11984, Part 8, p. 9315) are:

"The Federal Power Commission will have power to regulate the price of gas shipped and sold at wholesale in interstate commerce and so they will investigate and find out what is a fair price for it. * * *

* * * * * *

"Simply because of the fact that under the bill, if the gas is shipped in interstate commerce, the Federal Power Commission has the right to investigate and say whether or not the company which ships it charges a fair rate for the wholesale gas which it is selling to the City of Columbus or the City of Cleveland. * * *"

(7) *Conclusions as to Legislative History:*

From the above review, it is conclusively shown, we submit, that "the production or gathering of natural gas"

is a term of broad significance, and that, by employing it in contradistinction to the "business of transporting and selling natural gas in interstate commerce"; Congress intended to exclude from the purview of the Act the whole business of producing and gathering gas, *i. e.*, the drilling, maintenance and operation of wells, the movement of gas through the field gathering lines to the main interstate trunk pipe lines and the sale and delivery of the gas to those pipe line customers—in short, everything antecedent to the main interstate operation of taking the gas out of the fields to distant markets.

Such is indubitably the sense in which the exemption was understood and employed by Chairman Lea, Representative Cole, Mr. De Vane, and others responsible for the drafting of the legislation, for, in referring to it, they speak repeatedly of the "gathering companies", the "price paid to the gatherer", the "gathering rate" all as being exempt. And the conclusion becomes doubly certain in the light of the repeated statement that the purpose of the Act is not to regulate the entire realm of interstate commerce but only the "pipe line" or "transportation" phase of the business.

2. *Conclusion as to the Meaning of "Production or Gathering"*

It should be clear that the function of gathering extends to the point where interstate trunk line transmission begins. The only authority contrary to this is the Commission's own conclusion, affirmed by the Court below, which is against all facts as testified by its Staff, and a White Paper (F. P. C. G-580, *Section 1(b) of The Natural Gas Act With Reference to Production and Gathering*), which attempts a distinction of this case by name.

Petitioner maintains that the facts in this case showing a ramification over the production field and the constant concentration of gas the closer it gets to the sales

points, conclusively evidence the gathering function. The word "dendritic" as used by a Staff witness (R. II, 610) is the best possible description of the system.[8]

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[8] Reference to the map (R. II, 608) indicates petitioner's complex field pipe line system reaching to the periphery of petitioner's production and gas purchase area in the Monroe Field. Its purpose is to move the gas from petitioner's wells and points of purchase to the points of sale to the three purchasing pipe line companies and to petitioner's own trunk line system. This field system has been characterized by a Commission Staff witness as "dendritic in pattern" (R. II, 610), taking the gas from the wells through four-inch pipe lines which deliver the gas into still larger lines until it finds its way into either the admittedly regulable channel or to the three purchasing pipe line companies (R. II, 609-610). The gas over which petitioner claims the Commission has no jurisdiction thus, dendritically, moves through the field pipe line system into lines F-1 and F-33A to the points of delivery to Mississippi River Fuel Corporation and Southern Natural Gas Company (designated as 176-S and 177-S on map R. II, 608) and through lines F-44 and F-43 for delivery to Memphis Natural Gas Company (178-S on R. II, 608). From the wells in the northern and western portions of the field, the gas moves through various lines including F-3, F-51 and F-59 until it reaches F-1 or F-44. From the southern part the gas moves through various field lines, including F-45, and then into F-1 for delivery to Mississippi River Fuel Corporation and Southern Natural. Purchased gas from United Carbon Company is received through F-13 (purchasing point designated 137-P, R. II, 608) and moves through F-45 into line F-1. From Southern Carbon Company the gas is received into F-1 (128-P, R. II, 608) at the extreme north end of the line (R. I, 135-137). Gas purchased from Hope Producing Company (purchased at points 160-P and 161-P, R. II, 608) moves through line F-1 or F-44. Line F-1 serves the purpose of a "header" into which the gas is delivered at various points and from which it may be taken out for delivery to the three purchasing companies and for petitioner's trunk pipe line (R. II, 611, 614, 616). Lines F-44 and F-1 (north of DeSiard Station on the map, *supra*), and F-33 represent the last and main *branches* of the dendritic pattern. Reference to the map will indicate clearly that the trunks of the pattern are formed only by the trunk pipe lines of the three purchasing pipe line companies. The gas collected in the southern part of the system finding its way into F-1 and F-44 goes north to the sales points to the three pipe line companies (R. I, 183-184, 608). None of the gas so delivered to the three purchasing pipe line companies is compressed at DeSiard Station (in the Record sometimes called "Fowler" Station), petitioner's only station in the field (R. I, 135-136), and the beginning of petitioner's trunk transmission system.

That petitioner as its last act before actual sale puts the gas into two lines near the delivery points shows that the act of gathering is involved for such collection is necessary for gathering to take place at all. Such collection, in fact, is *the gathering* together of the gas. Naturally this gathering cannot be coincident with sale and, therefore, must precede it. Gathering, once started, must continue until delivery to the trunk line for without the delivery, the gathering would be aborted. Moreover, in a case such as the instant one, where the production, gathering and initial delivery of the gas is performed by petitioner, whereas the acceptance of such delivery followed by scrubbing and cleaning the gas and its compression is performed by the purchaser who later transports it in interstate commerce, the initial sale by petitioner to such pipe line operator is an integral and essential part of the production and gathering operation.

III.

The sales here in question are not sales "in interstate commerce" under the Natural Gas Act.

The jurisdictional provision of the Natural Gas Act relating to sales provides:

> "The provisions of this act shall apply * * * to the sale in interstate commerce of natural gas for resale * * *." (52 Stat. Sec. 1(b), 15 U. S. C. Sec. 717(b))

"Interstate commerce" is defined in the Act as:

> "* * * commerce between any point in a state and any point outside thereof, or between points within the same state but through any place outside thereof". (52 Stat. Sec. 2(7), 15 U. S. C. Sec. 717a(7))

The Act, therefore, unlike many other acts of Congress, does not reach out to control all which Congress may control under the commerce clause of the Constitution. The sales, to be affected by the Act and by the Commission must be "in interstate commerce" and not merely affect such commerce. That this is so is evident from the verbiage of the Act and its purpose. The Act omits any attempt at control of those local activities controlled, for instance, by such legislation as the Fair Labor Standards Act[9] and the Second Agricultural Adjustment Act.[10] Instead, the Act was directed at the hiatus existing between the limits wherein a state may act and where Congress previously had not acted. That such was the intent and the provision of the Natural Gas Act appears from two opinions of this Court:

> "An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for *regulating the wholesale distribution to public service companies of natural gas moving interstate commerce, which this Court had declared to be interstate commerce not subject to certain types of state regulation* * * * the Act is restricted in its application 'to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale * * *'".

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[9] *United States* v. *Darby*, 312 U. S. 100, wherein the Court sustained the power of Congress over unfair working conditions in the production of goods for interstate commerce.

[10] *Wickard* v. *Filburn*, 317 U. S. 111, wherein the Court sustained the power of Congress over a farmer raising wheat for his own consumption because even such production might affect the market.

(Emphasis supplied) (*Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 506-507.)

and further:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and *local matters would be left to the state regulatory bodies.* Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own share." (Emphasis supplied) (*P. U. C.* v. *United Fuel Co.*, 317 U. S. 456 at 467.)

That this Court was correct in ascribing a restricted federal control under the Natural Gas Act is apparent from the report of the committees of both houses of Congress.[11] The Court also was correct in ascribing a restricted federal control as a matter of general statutory construction since a congressional intent to displace local laws in the exercise of the commerce power is not to be inferred "unless clearly indicated by those considerations which are persuasive of the statutory purpose" (*Mauer* v. *Hamilton*, 309 U. S. 598 at 614). Every statute is a unique problem "in which words derive vitality from the aim and nature of the specific legislation." (*Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 at 351). This Court

[11] The Senate and House reports are identical on this. See House Report 709, 75th Cong., 1st Sess., pp. 1-2; Senate Report 1162, 75th Cong. 1st Sess., pp. 1-2.

has already, as evidenced by the cases cited above, recognized the aim and nature of the Natural Gas Act.

It being clear, therefore, that Congress did not intend and did not legislate to reach the full limits of its authority, is the activity of petitioner in the Monroe Gas Field such as may be controlled by the states concerned? It earnestly is submitted that the states may and were intended by the Act so to control for reasons given below.

"Sale in interstate commerce" has a meaning settled in our law respecting the commerce clause. A sale is not one "in interstate commerce" where one surrenders title and possession wholly within a state of production even though subsequent interstate transportation is probable, contemplated, and really takes place.

Production itself is clearly a local matter even though the goods produced are designed for interstate transportation, *e.g.*, a state may enact prohibition statutes against intoxicating liquors; or may regulate, prorate or tax natural gas; or prorate agricultural products (*Kidd* v. *Pearson*, 128 U. S. 1, 19, 22; *Carter* v. *Virginia*, 321 U. S. 131; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 287-288; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Railroad Commission* v. *Rowan & Nichols*, 310 U. S. 573; *Parker* v. *Brown*, 317 U. S. 341).

In the case of a local intrastate sale of goods intended for interstate commerce—in the absence of legislation expressly directed to local matters "affecting interstate commerce"—the matter is still of only local concern since the goods "though intended for exportation to another state" are not in interstate commerce until the final movement of "transportation from the state of their origin to that of their destination" (*Coe* v. *Errol*, 116 U. S. 517, 524-528; *Federal Compress Co.* v. *McLean*, 291 U. S. 17,

21-22). Therefore, the states may exercise taxing power as to such sales. (*Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62, 67-68). The fact that taxes are involved in many of these cases should make no difference since, as pointed out by Mr. Justice Holmes (dissenting in *Pennsylvania* v. *West Virginia*, 262 U. S. 553 at 601) there is "no relevant distinction between taxing and regulating in other ways." Indeed, states may do more than tax. They may inspect and regulate the packaging and branding (*Turner* v. *Maryland*, 107 U. S. 38) and may fix warehousing rates (*Townsend* v. *Yeomans*, 301 U. S. 441) as well as fix the prices at which local producers sell products to those who will carry the goods in interstate commerce (*Milk Control Board* v. *Eisenberg Co.*, 306 U. S. 346, 352-353). The last cited case marked a change from earlier cases in the legal concept of the relation of the commerce clause to local sales of goods destined for interstate movement. The true character of the relationship of such sale to commerce is that it "affects interstate commerce," but is not a part of it requiring federal regulation.

In this case we do not have the question of whether Congress has exercised the sum total of its power under the commerce clause, but one merely of the extent of that exercise. The phrase "in interstate commerce" has been endowed with no greater meaning in the Natural Gas Act than in other legislation employing the same phrase. Examination of the three main classifications in which Congress has exercised its commerce power will demonstrate that "in interstate commerce" does not encompass local activities:

(1) Cases wherein Congress has specified the relation or burden upon interstate commerce of certain local activities and proceeds to regulate them. This is

the situation wherein the Congress has recognized the local nature of the activity and chooses to exercise its potential power. For instance, in the Packers & Stockyards Act there was precise specification of burdens (*Stafford* v. *Wallace*, 258 U. S. 495).

(2) Federal regulation of subjects "in or affecting interstate commerce". An instance of this is to be found in the National Labor Relations Act *(Santa Cruz Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467.)

(3) The regulation of matters *"in interstate commerce".* This is the language used in Section 1(b) of the Natural Gas Act which serves, along with other provisions in the Act, to delimit Commission jurisdiction. Consistent with the admonition that "while one may not end with the words of a disputed statute one certainly begins there" *(Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 350), it is only necessary to examine the words themselves because this Court has said:

> "* * * when in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. * * * We merely hold that to read '* * * in commerce' as though it meant '* * * any way affecting interestate commerce', requires, in view of relevant consideration, much clearer manifestation of intention than Congress has furnished." *(Federal Trade Commission* v. *Bunte Bros.* supra, 351, 355.)

It is apparent that "sales in interstate commerce" as used in the Natural Gas Act has no different meaning in the case at bar then when it has been used elsewhere.

The conclusions of the Commission and the Circuit Court of Appeals in the instant case that the sales of gas produced, purchased, gathered and sold to purchasers all

within the Monroe Field for subsequent compression and interstate exportation are sales "in interstate commerce" as such commerce is defined are without foundation in law or in fact.

Petitioner earnestly submits that the proper legal foundation is set forth above. It will not be found in the two cases cited by the Court below, *Missouri* v. *Kansas Gas Co.* (265 U. S. 298) and *P.S.C.* v. *Attleboro Steam & Electric Co.*, (274 U.S. 83), since the *Missouri* case involved a sale off the trunk line system outside of the production state; and the *Attleboro* case involved a sale at the state line. These cases in the light of the definition of interstate commerce contained in the Natural Gas Act clearly are inapplicable.

Of course the action of the Court below is erroneous in fact if erroneous in law, but the facts so lend themselves to the legal principal involved that they deserve special consideration. All of petitioner's activities here involved are intrastate *in fact*. Petitioner does nothing in moving the gas outside of the state. The facts set forth above demonstrate that after all control over the gas passes to the pipe line companies several things are done *by these purchasers* which are analogous to packaging and preparing for the first movement "between any point in a state and any point outside thereof * * *." (Natural Gas Act, Sec. 2(7), 15 U. S. C. Sec. 717a(7)). The gas is commingled with gas purchased from others in the field, it passes through scrubbers and then it passes through two stages of compression necessary for its movement. Each compression causes the gas to be volumetrically smaller than before. If the production of power by a compressor engine is sufficiently local in nature to be subject to tax by a state even though the compressor itself starts the gas on a journey interstate,

a fortiori: the intervention of two other factors (commingling and scrubbing) *after* petitioner delivers the gas and before the act of compression makes the activity local. A tax of the State of Louisiana on such production of power was held to be valid in *Coverdale* v. *Arkansas-Louisiana Pipe Line Company* (303 U. S. 604). The tax was not imposed upon the act of moving the gas but of generating the power, and even though the compression end of the unit was engaged in starting the gas on its interstate journey, nevertheless the power production by the engine was held to be a local event subject to taxation. This case is based on the concept that only after the gas moves from the compressors on its journey outside the State does interstate commerce begin, and that, of course, conforms to the definition of interstate commerce in the Natural Gas Act.

Conclusion.

The Act places two limitations upon the Commission's price fixing jurisdiction: First, the sale must be one "in interstate commerce"; and second, functionally, there must be no regulation of the "production or gathering of natural gas."

Applicable to both of these limitations is this fact: the record is replete with evidence pointing only to the fact that the sales here challenged take place as a part of production and gathering and before interstate commerce as defined in the Act commences. The Commission, however, has been satisfied with the general legal conclusion that all phases of petitioner's business is price regulable by it (R. I, 60 *et seq.*). We must assume this for the Commission does not designate the point marking the break between its province and that of the State. It states that

petitioner is operated as a unit (R. I, 60), as it certainly must be to give any service at all (R. I, 206-207). Such integration is true as well of an admittedly interstate trunk pipe line from which both non-jurisdictional and jurisdictional sales are made. But in the latter case some means is adopted to segregate the two so that the Commission does not trespass (See *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 588). Integration should serve no greater purpose here than on the retail sales side of the picture. To follow the Commission's rationale, however, such greater purpose from integration could come about. Thus not only this petitioner but states and their regulatory bodies are caught on the horns of a dilemma. Does production and gathering end, and transportation in interstate commerce begin coincident with or an instant prior to the gatherer's first sale in the field? If so, the producer with one well and fifty feet of well line is subject to Commission regulation if his gas finally enters into interstate flow. Or does the magical point occur somewhere along the dendritic pattern where enough gas has been concentrated into one line for the Commission to say, "Here is the point of jurisdiction"? Or, further, does it occur in the smaller branches of the pattern? Or, the ultimate question, is the jurisdictional point at the origin of the gas in the gas bearing sands? The absurdity of the questions does not detract from their relevancy for these questions can reasonably occur, and have occurred, because of the Commission's decision in this case.

In all gathering there must be a bringing together but it is this inescapable circumstance that the Commission has used as the basis for its conclusion. To do this is a flagrant disregard of the Act of Congress and must be prohibited not only because of this petitioner's pecuniary interest, but

also for the proper recognition of the legal spheres of action of the Federal and state governments.

Petitioner earnestly submits that the sales over which it claims the Commission has no jurisdiction are illustrative of the very type of sales which Congress did not and intended not to regulate under the Natural Gas Act. This is so for two separate and conclusive reasons: First, the sales constitute production and gathering in every valid sense of those two words; and secondly, the sales are not in interstate commerce for resale.

For the foregoing reasons, petitioner submits that the order of the Circuit Court of Appeals for the Fifth Circuit dismissing petitioner's petition for review be reversed and that the order of the Commission relating to the field sales be held for naught.

Respectfully submitted,

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